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No. 05-1026

Supreme Court, U.S.
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In The

Supreme Court of the United States

LEVI HOGNER,

Petitioner,

v.

LEROY M. STRENKE and
JUANITA M. STRENKE,

Respondents.

On Petition For *Writ Of Certiorari*
To The State Of Wisconsin
Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents object to Petitioner's statement of the question presented on the grounds that it is argumentative. The question presented for review, more properly stated, is:

Whether the Wisconsin Court of Appeals properly determined that the punitive damage award of $225,000 did not violate the protections afforded by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

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STATEMENT ON JURISDICTION

This court is without jurisdiction pursuant to 28 U.S.C. §1257 as to petitioner's argument that the Wisconsin Court of Appeals improperly considered the potential harm that might be caused by petitioner's conduct, because (1) petitioner's counsel made no objection to the trial court's jury instruction which included that item as a factor for the jury to consider in determining punitive damages and (2) petitioner never contended in the Wisconsin Court of Appeals that potential harm was improperly considered.

Moreover, this court is also without jurisdiction pursuant to 28 U.S.C. §1257, because the petitioner's request for Supreme Court review is based solely on the claim that the Wisconsin Court of Appeals failed to apply what is established law, and, hence, petitioner's request fails to set forth an important question of federal law.

STATEMENT OF THE CASE

In concluding that the punitive damage award did not violate Hogner's due process rights, the Wisconsin Court of Appeals, contrary to the petitioner's statement of the case, did not "flatly dismiss" any command of *State Farm Mutual Auto Insurance Company v. Campbell*, 538 U.S. 408 (2003), that punitive damages should almost never exceed a single-digit multiple of actual damages. In reaching its decision that the jury's punitive damage award was not excessive and therefore did not violate the Due Process clause, the Wisconsin Court of Appeals thoroughly analyzed and applied the Supreme Court's statements in *State Farm*.

Petitioner also fails to include certain material facts in his statement of the case:

First, not only was petitioner severely intoxicated at the time of the accident in question, but he had been arrested and convicted for drunken driving on four occasions prior to the one in question. (App., p. 2a-3a, 7a-8a)

Second, although petitioner claims before this court that the Wisconsin Court of Appeals improperly considered the potential harm that could be caused by his conduct, the record shows petitioner's counsel made no objection to the trial court's instruction to the jury that the factors it was to consider in determining punitive damages under Wisconsin law included that "potential damage which might have been done by such acts as well as the actual damage." (App., p. 13a-27a) Likewise, although petitioner did raise the issue of the constitutionality of the punitive damage award in the Wisconsin Court of Appeals, that challenge was never based on an improper consideration of the potential harm that could be caused by his reprehensible conduct.

Third, the jury in this case heard all the evidence about the defendant's financial circumstances and the instruction as to the factors it was to consider in determining punitive damages included taking into consideration the defendant's ability to pay. (App., 3a-7a, 27a)

ARGUMENT FOR DENYING THE PETITION

I. The Wisconsin Court of Appeals Did Not Dismiss or Ignore *State Farm's* Comments About a Single-Digit Ratio.

Throughout his petition, Hogner claims that the Wisconsin Court of Appeals "ignored," "dismissed" and "disregarded" this Court's decision in *State Farm*. Nothing could be further from the truth. In the text of its decision in *Strenke v. Hogner*, 2005 WI App 194, 704 N.W.2d 309, the Wisconsin Court of Appeals directly addressed *State Farm*, citing, quoting, analyzing and applying this Court's decision. *Id.* At ¶¶ 14-17, 21, 23-26.

Hogner's petition is based on the premise that *State Farm* established a "single-digit rule." (Petition, p. 6) However, as the Wisconsin Court of Appeals correctly determined, *State Farm* essentially reaffirmed the guideposts set forth by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and neither case established a bright-line "rule" for a single-digit ratio of punitive damages to actual damages. *See Strenke at* ¶ 17 n. 8, ¶ 25.

A simple reading of this Court's decision in *State Farm* concerning ratios destroys Hogner's claim that *State Farm* established a "single-digit rule." The Court reiterated:

> [W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. [Gore,] 517 U.S. at 582.

538 U.S. at 424.

> ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award."); *TXO* [*Production Corp. v. Alliance Resources Corp*, 509 U.S. 443 (1993)], *supra*, at 458.

538 U.S. at 424-25.

> We decline again to impose a bright-line ratio which a punitive damages cannot exceed.

538 U.S. at 425.

> [B]ecause there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those that we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." [*Gore*, 517 U.S. at 582]; see also, [*Gore*, 517 U.S. at 582] (positing that a higher ratio *might* be necessary where "the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine").

538 U.S. at 425.

> The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

538 U.S. at 425.

Thus, this Court in *State Farm* made it clear that it was not establishing a "single-digit rule," upon which Hogner's entire petition is based. The Wisconsin Court of Appeals specifically stated that the majority's statement in *State Farm* about a single-digit ratio is not "as the holding makes clear, a new single-digit rule." 2005 WI App 194,

¶17, n. 8. The Wisconsin Court of Appeals' comment that the majority's remark in *State Farm* concerning single-digit ratios is dicta is not a basis for Supreme Court review, because whether that remark is dicta or not, the Wisconsin Court of Appeals still properly considered and applied *State Farm's* principles and analytical framework concerning proportionality for determining the constitutionality of a punitive damages award.

There is also no support for Hogner's claim that "courts all too routinely have ignored or defied" the decision in *State Farm* or that there is "an increasing number of courts that have disregarded" the holdings in *State Farm* (Petition, p. 5) or that the decision here is part of a "trend." (Petition, p. 20) Hogner merely cites 7 examples of appellate cases where courts have allowed awards with ratios greater than 9:1 and 5 examples of appellate cases where courts have limited awards to ratios below 10:1. (Hogner petition, pp. 10-11, n. 6) There is no showing that these represent all cases addressing *State Farm's* dictates. This does not establish anything other than the fact that courts throughout our 50 states are going about the process of applying this Court's teachings about punitive damages and due process and that, just as those teachings explain, there may be cases in which a greater than single-digit ratio is justified without violating the defendant's due process rights. Each case must be considered on its own facts and not by simply looking at the ratio. Thus, Hogner fails to establish some disturbing trend that requires this Court to do more explaining of its views on proportionality of punitive damages. Certainly this particular case does not call for that.

II. Hogner Has Waived the Right to Question the Consideration of Potential Harm in the Punitive Damage Analysis.

Hogner claims that review is warranted because the Wisconsin courts improperly considered the potential harm that could be caused by his conduct. (Petition, pp. 12-17) However, Hogner waived this argument by failing, (1) before the trial court, to object to the jury instruction which told the jury that among the factors it was to consider in determining punitive damages was that very potential harm (App., pp. 13a-27a) and (2) before the Wisconsin Court of Appeals, to contend that the potential harm that could be caused by his conduct should not be considered.

It is axiomatic that an appellate court, let alone the highest appellate court in the land, will generally not review any argument raised in the court below. *United States v. Bean*, 537 U.S. 71 (2002); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). This Court has specifically held that, when raising a federal question for Supreme Court review, it is essential that the question be raised, presented, and pursued in a timely and proper manner at the appropriate point in the state court proceedings. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919). In fact, this Court has no jurisdiction to exercise its appellate power over state court judgments under 28 U.S.C. §1257 unless a federal question has been both raised and decided in the state court below. *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Thus, Hogner has waived any right to raise this argument.

III. Hogner's Claim that the Wisconsin Court of Appeals Misapplied This Court's Decision in *State Farm* Is Not a Basis for Granting Certiorari.

In *State Farm*, this Court reiterated the importance of a reasoned application of the guideposts in *Gore*. Elaborating on these guideposts this Court highlighted several factors for consideration by courts when engaged in a de novo due process review of punitive damages.

As mentioned above, the Wisconsin Court of Appeals thoroughly applied this Court's decision in *State Farm* in its decision in this case. Petitioner can cite to no language from the *Strenke* decision that truly misstates or contradicts any portion of this court's holding in *State Farm*. Hence, Hogner's petition is based solely on the claim that the Wisconsin Court of Appeals misapplied the law of *State Farm* to the specific facts in this case. Respondents take issue with Hogner's claim that the Wisconsin Court of Appeals misapplied *State Farm*. *See* §IV *infra*. However, even if Hogner were correct in his characterization of the Wisconsin Court of Appeals' decision, his petition fails to set forth a basis for Supreme Court review.

This Court has typically limited discretionary review of decisions coming out of the state courts to only those cases that involve important constitutional questions. *Zucht v. King*, 260 U.S. 174, 176 (1922). In fact Rule 10 of the Rules of the Supreme Court of the United States, which sets forth the appropriate reasons for granting a writ of certiorari, has specifically incorporated the requirement that the case involve an "important federal question." Sup. Ct. R. 10.

It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of error in lower court decisions. The Court's role, rather, is to determine questions of constitutional importance. It is then the role of the lower courts to apply these principles to the great mass of cases. The responsibility of this Court has been characterized as too great to require it to correct every perceived error by lower courts in the application of accepted principles. Robert L. Stern Et Al., Supreme Court Practice §4.17 (7th Ed. 1993). As Justice Rehnquist observed in *Ross v. Moffitt,* 417 U.S. 600, 616 (1974). "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." The court's aversion to error correction has been codified in this Court's Rule 10:

> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10.

Hogner's petition asks for nothing more than error correction based on the alleged misapplication of the established law, i.e., *State Farm,* by the Wisconsin Court of Appeals. As such, Hogner's petition does not involve a substantial federal question but rather a question of importance merely to the litigants in the pending action. This Court has adopted a practice of limiting the acceptance of appeals to only those cases that involve the settlement of issues that are of importance to the public, as opposed merely to the parties. *Rice v. Souix City Memorial Park Cemetary,* 349 U.S. 70 (1954). Hogner provides this Court with no reason to deviate from this accepted practice.

Unable to identify a substantial federal question, Hogner suggests that granting the writ would allow this Court to "resolve any gap in this Court's punitive damages jurisprudence." (Petition, p. 4) However, no gap in jurisprudence is demonstrated by Hogner; the only gap is between the Wisconsin Court of Appeals' conclusion and Hogner's desired conclusion.

IV. Applying the Principles in *State Farm*, the Wisconsin Court of Appeals Correctly Determined that the Jury's Punitive Damages Verdict Did Not Violate Hogner's Due Process Rights.

A punitive damage award that is the product of a fair process is entitled to a strong presumption of validity. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993). Hogner points to nothing unfair about the trial. No evidentiary rulings are challenged. The compensatory damages phase yielded only a modest damages award, demonstrating that the jury gave careful consideration to each side's evidence and arguments.

A state may, consistent with the Constitution, further its goals of punishment and deterrence through the imposition of punitive damages. *BMW*, 517 U.S. at 568; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

Wisconsin courts have recognized the important role that punitive damages play in serving the interests of punishing and deterring drunk driving. As the court observed in *Lievrouw v. Roth*, 157 Wis.2d 332, 345, 459 N.W.2d 850 (Ct.App. 1990), "[d]runk driving is a terrible scourge," and "[i]ntentionally driving while alcohol-impaired is the type of outrageous conduct that punitive

damages should punish and deter." *Id.* Thus, Hogner cannot argue that drunk driving is unworthy of punishment and deterrence, or that recidivist drunk driving is undeserving of added sanctions.

Due process requires that a person receive fair notice of the conduct that will subject him to punishment and the severity of the penalty that a state may impose. *BMW*, 517 U.S. at 574. Hogner cannot argue that he lacked notice that his drunk driving could subject him to a punitive damage award. *Lievrouw* made clear that drunken driving "will support an award of punitive damages in an appropriate case." 157 Wis.2d at 348. If there ever were an appropriate case, this is one.

As for the size of the award, only when it is grossly excessive in relation to the legitimate state interests in punishment and deterrence does it violate due process. *BMW*, 517 U.S. at 568. In *BMW*, 517 U.S. at 575, the court described three guideposts to determine whether a defendant had adequate notice of the size of the possible sanction: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered and the punitive damage award; and (3) the difference between the award and the civil penalties authorized or imposed in comparable circumstances.

In *State Farm*, the court enunciated five sub-factors for determining the degree of reprehensibility: (1) whether "the harm caused was physical as opposed to economic"; (2) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (3) whether "the target of the conduct had financial vulnerability"; (4) whether "the conduct involved repeated actions or was an isolated incident"; and (5) whether "the

harm was the result of intentional malice, trickery, or deceit, or mere accident." 538 U.S. at 419; *BMW*, 517 U.S. at 576-77.

A consideration of these factors demonstrates that the punitive damages award here was not excessive.

A. Hogner's Conduct Was Reprehensible

The most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct. *State Farm*, 538 U.S. at 419; *BMW*, 517 U.S. at 575. The reprehensibility of Hogner's conduct is beyond dispute. This was not a close case, where a driver can plausibly claim that he lacked knowledge that he was impaired. Hogner here drank himself into an extremely dangerous level of inebriation and impairment. His blood alcohol level by weight tested at .269. As he left the tavern, he got behind the wheel of his car intending to drive to another tavern, presumably to drink more. He had a passenger in his car. Thus, he deliberately endangered his own passenger, and all other users of Wisconsin's roadways, including Mr. Strenke.

Hogner had been convicted four times before for drunk driving and knew the legal implications. The evidence was sufficient and compelled a finding that Hogner had engaged in a pattern of drunk driving and endangerment of the public with whom he shared the roads.

The aggravating factors discussed in *BMW*, 517 U.S. at 576-80, are present here. First, Hogner's conduct evinced an intentional disregard for the safety of the other users of the public highways, and this led to the most serious form of harm – personal injury. Second, Hogner's

acts were affirmative acts of misconduct, not merely acts of misfeasance. Third, Hogner's conduct was part of a pattern of conduct that reflected an intentional disregard for the public's rights to safety and bodily security. As noted in *BMW*, 517 U.S. at 576-77, repeated misconduct is more reprehensible, more deserving of severe punishment, and more in need of deterrence than an individual instance of misconduct. Given the strength of the evidence of reprehensibility, held to be the most important of the factors, the punitive damage award does not shock the conscience, as the trial court ruled.

B. The Wisconsin Court Properly Evaluated the Proportionality of the Punitive Damages Award, Including Considering the Potential Harm or Damages.

Another indicium of excessiveness is the comparison of the punitive damage award to the actual or potential harm or damages. Although this is only one guidepost, Hogner reads *State Farm* as establishing a mathematical limitation on the size of a punitive damage award as a matter of due process. But *State Farm*'s actual language says, at 1524:

> Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. . . . We decline once again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, ***few*** awards exceeding a single-digit ratio between punitive and

> compensatory damages, ***to a significant degree***, will satisfy due process.

(emphasis added)

Despite the court's specific disavowal of any bright-line rule, Hogner's petition cites this passage as erecting a "single-digit rule." (Petition p. 6) Judge Posner, writing for the Seventh Circuit in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003), explained that "[t]he supreme court [in *State Farm*] did not, however, lay down a 4-to-1 or single-digit-ratio rule – it said merely that 'there is a presumption against an award that has a 125-to-1 ratio'." In *Mathias*, the court upheld an award of punitive damages that was 37.2 times the compensatory damages awarded by the jury.

State Farm explained that "ratios greater than those *we have previously upheld* may comport with due process" where "a particularly egregious act has resulted in only a small amount of economic damages" or where "'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" 538 U.S. at 425 (emphasis added). Thus, to fully understand *State Farm* it is necessary to examine the ratios the Court has "previously upheld." Among these is *TXO*, 509 U.S. 443.[1] *TXO* was the most recent opinion in which the Supreme Court had "previously upheld" a punitive damage award, and it included an extensive concurring opinion by Justice Kennedy, the author of *State Farm*, in which he states

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[1] *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (4:1 ratio between punitive and compensatory damages, and 200:1 ratio between punitive damages and plaintiff's "hard" out-of-pocket expenses); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (punitive to compensatory damages ratio over 100:1).

unequivocally that the award, which resulted in a punitive to compensatory ratio of 526 to 1, was constitutionally appropriate. *TXO* was cited with approval in *State Farm*. 538 U.S. at 416, 423-25.

In *TXO*, a West Virginia jury determined that the defendant TXO, a large oil company, intentionally sought to cloud the plaintiff's title to oil and gas rights which TXO desired to purchase. TXO's actions were found to be malicious and part of a broad practice of fraud and trickery. The award of $10 million punitive damages, compared to the award of $19,000 in compensatory damages, a ratio of 526 to 1, was specifically approved by the Supreme Court as not constitutionally excessive.

The *TXO* court found that "[w]hile petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents had petitioner succeeded in its illicit scheme." Assuming that the potential loss could be $1 million, the court stated that "the disparity between the punitive award and the potential harm (i.e. 10 to 1) does not, in our view, 'jar one's constitutional sensibilities'" *TXO*, 509 U.S. at 462 (citation omitted)

Justice Kennedy, however, refused to rely on the 10 to 1 ratio and specifically approved the ratio of 526 to 1. In his concurring opinion, he wrote,

> The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions . . . I do not agree that [the punitive to compensatory ratio relied

> upon by the majority] provides a constitutionally adequate foundation for concluding that the punitive damage verdict against *TXO* was rational.

Id. at 467-68.

Justice Kennedy found the award appropriate because TXO acted with malice as part of a pattern of practice of fraud, trickery and deceit. Further, he specifically endorsed the evidence of other instances of similar malfeasance, the evidence of TXO's "vast financial resources," and the fact that "TXO would suffer only as a result of a large judgment." *Id.* at 469.

The Supreme Court's clear approval in *State Farm* of its *TXO* opinion is significant. There was no evidence in *TXO* to suggest that the court considered the defendant's conduct to have satisfied *any* of the first three sub-factors (no personal injury, no health and safety issues, and no financial vulnerability). The harm was purely economic harm done by one corporation to another and thus factors (1) and (2) could not possibly have been accomplished, and the court made no reference to the financial vulnerability of the plaintiff.

Thus, under the Supreme Court's own guidelines, conduct which is not at the top of the scale for reprehensible conduct warranted a ratio of punitive to actual damages of at 526 to 1, where the potential harm was great. Given the Court's clear approval in *State Farm* of its "previously upheld" awards, one can only conclude that awards in excess of 10 to 1 are perfectly appropriate for those cases where at least some, if not all, of the reprehensibility sub-factors are present, and particularly where the last two sub-factors exist. Indeed, given the Court's continued emphasis on a defendant's pattern and practice and

the need for strong medicine where recidivist behavior is present, it is apparent that the fourth and fifth sub-factors (4) repeated actions, and (5) malice, trickery or deceit are the most significant in assessing the amount of a punitive damages award.

Recognizing that the Supreme Court meant to label as suspect only those awards that exceed a single-digit ratio by a "significant degree" is also consistent with its oft-stated holding, confirmed again in *State Farm,* that it refuses to set a bright-line test for a punitive to compensatory ratio. Instead, the Court holds, in essence, that a punitive award should be closer to a single-digit ratio than ratios such as 145:1 or 500:1, depending on the circumstances of the particular case. This is not the bright-line test or "single-digit rule" that Hogner urges.

The U.S. Supreme Court has rejected the notion that the constitutional line is marked by a simple mathematical formula and, instead, has favored a general inquiry into reasonableness. *BMW*, 517 U.S. at 582-83. This is understandable since it is not possible to capture in one ratio all of the qualitative factors involved in determining the appropriate level of punishment. "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 123 S.Ct. at 1524.

Hogner's argument thus starts from the flawed premise that there is a fixed constitutional ratio. Beyond that flawed assumption, however, Hogner's argument ignores that the proportionality of the punitive damage award is measured not solely in comparison to the actual award of compensatory damages, but also in comparison to the *potential* harm caused to the victim and others. This

Court has always recognized the potential harm which could be caused by the defendant's conduct as a valid factor to be considered in looking at the constitutionality of a punitive damages award. *BMW*, 517 U.S. at 575, 581-82; *TXO*, 509 U.S. at 460.

In *TXO* the Court stated:

> It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim . . . as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.

509 U.S. at 460. The Court then explicitly considered the potential that defendant's conduct could have caused $1,000,000 in compensatory damages, rather than the $19,000 awarded by the jury, in determining how to address the proportionality of the punitive damages. 509 U.S. at 458-62. In *State Farm*, this Court cited *TXO* with approval on this point. 538 U.S. at 424-25. The Wisconsin Court of Appeals recognized that "*TXO* is still good law," *Strenke*, 2005 WI App at ¶24, n. 13, and then examined the potential harm that a recidivist drunk driver like Hogner could cause. The court concluded that absent Hogner's "good luck," his conduct could have easily resulted in compensatory damages that would have put the punitive damages award in the 1:1 or 2:1 range. 2005 WI App at ¶24, n. 14. This is the same valid consideration and analysis as that done by this Court in *TXO*.

Hogner's conduct was particularly egregious and the actual harm it caused was substantial, even though the award was only $2,000. Even so, the jury's compensatory damage award is not the only figure to use in any ratio

because it does not reflect the potential harm attributable to Hogner's drunk driving. Strenke could have been hurt much worse or killed. There could have been other passengers in the Strenke car. Hogner had a passenger who could have likewise been injured or killed. Multiple vehicles could have become involved if they had been in the area when the collision occurred. It is fortuitous that the consequences were not disastrous.

Thus the potential harm in this case is far more significant than the modest amount of harm that resulted through happenstance. The difficulty in measuring in financial terms the value of personal physical injuries and the potential for catastrophe when a drunk driver gets behind the wheel demonstrates the need for a higher ratio, a circumstance recognized in *State Farm* ("a higher ratio *might* be necessary where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" 123 S. Ct. at 1524, *quoting Gore* [emphasis in the original]).

The jury, the trial court, and the Wisconsin Court of Appeals were entitled to consider the potential harm that could result if similar future behavior by Hogner is not deterred by a heavy punitive damage sanction. Hogner will presumably have the opportunity – whether licensed or not – to get behind the wheel again. If he were to engage in this reprehensible conduct again, he could cause deaths or serious injuries. This large punitive damage award serves the deterrent purpose of making Hogner, and others in his community, think twice before drinking and driving. Thus, while Hogner stresses the disparity between the punitive damage award and the jury's award of compensatory damages, that disparity vanishes when one considers the potential harm. Consideration of the second

BMW guidepost therefore does not support a conclusion that the punitive damage award is excessive.

Thus, the consideration of potential harm or damages is not some "vague notion" as described by Hogner. (Petition, p. 12) Hogner points to no conflict in the federal circuits or state courts regarding the concept of considering potential harm in the punitive damage analysis that would justify Supreme Court review. The Wisconsin Court of Appeals did nothing more than apply well known guidelines of the United States Supreme Court in determining that Hogner's right to due process had not been violated.

C. Petitioner's Financial Condition Was Properly Considered by the Jury and the Wisconsin Court of Appeals.

Hogner also attacks the punitive damage award because it is beyond his current net worth. This argument is without merit. No Supreme Court case states that the ratio of a defendant's net worth to the punitive damage award is a constitutional factor or that a punitive damage award that exceeds a defendant's net worth is unconstitutional as a matter of law. Hogner's due process rights were not violated because his conduct justified punishment in excess of his worth. Also, Hogner's argument about financial condition introduces a complexity to Hogner's ratio argument that has not been confronted in any prior cases. There is no prior case where ability to pay has been somehow engrafted into the constitutional analysis of the proportionality of a punitive damage award. There is no substantial federal question where the Wisconsin Court of Appeals decision does not conflict with any prior decisions of this court or any other court relative to the matter of

defendant's wealth. Thus, this issue does not justify Supreme Court review.

That the judgment against Hogner for punitive damages may impose a substantial burden on him for the foreseeable future is an appropriate deterrent message to him and to others. It is not inappropriate that he live under the burden of this judgment for a considerable period, so that it might influence his future choices when those choices potentially affect the health and safety of others.

Also, the defendant's lack of wealth is often within his or her control. A defendant can choose to earn less or spend more thereby depressing his or her net worth. If Hogner had been unemployed, without any earnings, he would be claiming that no award of punitive damages is constitutionally justified, because it would exceed his worth. Likewise, there is nothing to say that Hogner could not, in order to pay off his punitive damages obligation in the future, work to improve his financial position, by for example obtaining better paying employment and saving on expenses. To draw any kind of constitutional line for punitive damages awards at the level of a defendant's net worth could wipe out the deterrent effect, in which a state has a legitimate interest. An otherwise constitutionally valid punitive damage award that exceeds a defendant's net worth no more violates due process rights than does a compensatory damage award that exceeds the defendant's insurance and net worth.

It is also worth noting that "wealth" in this context includes the comparative resources that an insured driver can bring to bear in the defense of an accident case like this one where only modest compensatory damages are at

stake. *See Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677-78 (7th Cir. 2003). The public should not have to await a multiple-death catastrophe or one where the victim requires years of expensive life support, to impose a heavy dose of punitive damages on those who feel unconstrained to drink and drive. Punitive damages should be available when the misconduct involved is highly dangerous, even though only modest compensatory damages are awarded, so as to encourage victims and their attorneys to seek justice in the courts and thereby deter such misconduct and save lives.

Finally, the record shows that the Wisconsin courts did not ignore the evidence concerning Hogner's wealth. The jury heard the evidence of Hogner's ability to pay, (App., 4a-7a) consistent with Wisconsin law which makes such a proper factor for the jury and court to consider. The trial court instructed the jury via Wis Jury Instruction – Civil 1707.1 that the defendant's ability to pay is a factor they were to consider in awarding punitive damages. (App., 27a) The Wisconsin Court of Appeals also considered Hogner's "conclusory" argument that the award was excessive because of his financial condition, noting that this was an appropriate factor for the jury to consider and that it could not, on constitutional grounds, say that an award "that cannot be immediately satisfied is always, as a matter of law, constitutionally insupportable." *Strenke*, 2005 WI App at ¶27, n. 17.

CONCLUSION

Nothing in the Wisconsin Court of Appeals' decision in *Strenke* in any way contradicts this Court's holding in *State Farm*. At best, Hogner's petition requests review solely based on the Wisconsin Court of Appeals' alleged misapplication of established law. This Court is not a court of error correction. Hogner waived the right to question the consideration of potential harm by failing to object to that factor in the jury instructions and by failing to argue in the appellate court below that it should not be considered. Because Hogner has failed to present a significant federal question requiring Supreme Court Review, his petition should be denied.

In addition, there is no basis for Hogner's claim that the Wisconsin Court of Appeals misapplied the law. In *Strenke* the Wisconsin Court of Appeals correctly determined that the jury's punitive damage verdict comports with due process pursuant to this Court's prior decisions. Having little chance of success on the merits, Hogner has failed to establish a sufficient basis for Supreme Court review.

Respectfully submitted,

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May 15, 2006

APPENDIX A

CIRCUIT COURT

STATE OF WISCONSIN BARRON COUNTY

LE ROY M. STRENKE and
JUANITA M. STRENKE,

Plaintiffs,

vs.

LEVI HOGNER, NAU COUNTRY INSURANCE COMPANY, AMERICAN FAMILY MUTUAL INSURANCE COMPANY and BLUE CROSS AND BLUE SHIELD UNITED OF ALABAMA,

Defendants.

PARTIAL TRANSCRIPT OF JURY TRIAL

01-CV-179

Partial transcript of testimony given and proceedings had at the jury trial held in the above-entitled matter before HON. FREDERICK A. HENDERSON, Acting Circuit Judge, at the Courthouse in the City of Barron, Barron County, Wisconsin, on the 7th, 8th and 9th days of May, 2003.

APPEARANCES:

Mr. Owen R. Williams, Attorney at Law, appearing on behalf of the Plaintiff;

Ms. Karen Kingsley, Attorney at Law, appearing on behalf of the defendant;

Plaintiffs, LeRoy and Juanita Strenke, present in person; Defendant, Levi Hogner, present in person.

* * *

[2] THE COURT: All right. Now we go into the second phase of the trial so take over, Mr. Williams. Tell the jury what this is all about. Mr. Ament is now gone. He's not involved. Go ahead.

MR. WILLIAMS: I believe we are going to present this phase of the trial to the Court and the jury by stipulation. I'm addressing this remark to the Court because we have not discussed this, but what we are going to present to you is a stipulation that at the time that this accident occurred Levi Hogner was under the influence of alcohol and it was his 5th offense and that his alcohol content was .267 and I will then rest my case when the Court approves that stipulation, if the Court does approve it.

MS. KINGSLEY: I did want to briefly call Mr. Hogner.

THE COURT: Ms. Kingsley will present her client to testify about the operation of the vehicle at the time and what he has to say about that. Am I correct, Ms. Kingsley?

MS. KINGSLEY: Correct.

THE COURT: All right. Is that the stipulation as you understand it, Ms. Kingsley?

MS. KINGSLEY: That's fine.

THE COURT: We'll receive that stipulation into evidence and advise the jury that you're bound by that [3] stipulation. Okay.

MR. WILLIAMS: I made a mistake. I think it's .269, not .267.

THE COURT: We'll mark that as an exhibit. .269 is the alcohol content and that's by weight of alcohol in the blood as opposed to the volume. Go ahead. *LEVI HOGNER*, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. KINGSLEY:

Q. Mr. Hogner, I want to ask you about the incident. You admit that you were driving at the time of the incident prior to the accident?

A. Yes.

Q. Can you just kind of tell me in your own words what happened in the accident?

A. I remember coming from the bar, Dale's Twin Pines. We were going downtown Cumberland. and I was driving southbound. I was going to turn east, I believe, on 23rd. I seen cars coming. I believe I seen his blinker on as he was going to turn into the same street so I believe –

Q. Would that have been his right or –

A. His right.

Q. And what did you do?

A. I was believing I could turn before he did.

Q. And what happened?

[4] A. When I turned I got hit in the back.

Q. Okay.

A. Rear, right rear.

Q. Okay. And as a result of that did you plead to something?

A. Yes.

Q. And did you serve some time?

A. Yes, I did.

Q. How much time did you serve?

A. One year County Jail.

Q. Are you still on probation?

A. Yes.

Q. Okay. Part of this claim is for punitive damages so I need to ask you a little bit about your finances, what money you have and that type of thing, okay? Do you work?

A. Yes.

Q. Where do you work?

A. St. Croix Casino hotel.

Q. And what do you do there?

A. I'm a black jack dealer.

Q. How long have you done that?

A. For three years now.

Q. How much money do you earn doing that? Can you give me maybe an average month?

A. A thousand dollars a month.

[5] Q. Is that how much you take home or is that before taxes or what?

A. That's probably what I take home.

Q. About a thousand dollars a month? Okay, And do you have any other sources of income?

A. Per capita.

Q. Okay. Is that because you're a member of the Native American community?

A. Yes.

Q. And how much is that?

A. $1,500 a month before taxes.

Q. Okay. So do you know how much that is after?

A. After it's about a thousand dollars.

Q. So your total income for the month is about $2,000?

A. Yes.

Q. Okay. Then do you have any other sources of income?

A. No.

Q. Do you own any land?

A. No.

Q. Do you own any boats?

A. No.

Q. Any other big items that you own?

A. No.

Q. Do you own a car?

A. Well, not yet. I'm paying on a car.

[6] Q. How much are you paying on a car?

A. $226 a month.

Q. How much longer do you have to pay on that?

A. Four years.

Q. Let me ask you about your other living expenses. Do you pay rent?

A. Yes.

Q. How much do you pay?

A. $139 a month.

Q. Give me on average a month how much do you pay? How much you spend for food?

A. About $400 a month.

Q. How about utilities?

A. $30 a month.

Q. Do you support anyone besides yourself?

A. I have a son.

Q. And do you pay child support?

A. Yes, I do.

Q. How much do you pay a month for that?

A. $350 a month.

Q. Do you have any savings?

A. No.

Q. Do you have a checking account?

A. Yes, I do.

Q. How much is in your checking account?

[7] A. $20.

Q. Do you have any other debts we haven't talked about?

A. Yes.

Q. Tell me about any debts you have?

A. I have two for Cumberland Hospital in the amount of around $3,300.

Q. Okay. Any other debts?

A. No.

Q. Okay. Did we cover all your monthly expenses then?

A. Well, I pay the supervision fee for probation which is $40 a month.

MS. KINGSLEY: Okay. I think that's all I have. Thank you.

CROSS EXAMINATION BY MR. WILLIAMS:

Q. Mr. Hogner, were you convicted of drunk driving as a result of an occurrence on February 10th of 1989?

A. Yes, I believe so.

Q. Were you convicted of a drunk driving offense on March 4th of 1990 in Buffalo County?

A. Yes.

Q. Were you convicted of drunk driving on March 25, 1993 in Barron County?

A. Yes.

Q. Were you convicted of drunk driving on May 29, 1994 in Polk County?

[8] A. Yes.

Q. And as a result of this driving were you convicted of drunk driving as a result of driving on October 16, 1998 in Barron County?

A. Yes.

Q. And am I correct that you've been convicted five times of drunk driving?

A. Yes.

Q. And that was a felony offense?

A. No.

Q. Now, where were you drinking before you were involved in this collision on October 16th?

A. Dale's Twin Pine tavern.

Q. And is that on State Trunk Highway 48?

A. Yes, it is.

Q. And how much do you weigh, or how much did you weigh at that time, Mr. Hogner?

A. I'd say 400 pounds.

Q. And how much did you have to drink at that time?

A. Four to six drinks at the bar.

Q. And four to six drinks. Do you know what you tested that time?

A. No.

Q. Let me show you what's been marked by the clerk as Exhibit 38. Is that you, Levi Hogner?

[9] A. Yes.

Q. Is that your address at that time, 2595 2nd Street?

A. Yes.

Q. And does this indicate blood was taken?

A. Yes.

Q. And does this indicate that blood was taken and you were .269?

A. Yes.

Q. And blood was taken at what, 1705? That's what, five minutes after five?

A. Yes.

Q. Were you taken to the hospital at that time?

A. Yes, I was.

Q. And you say you think you had four to six drinks. What were you drinking, sir?

A. Beer.

Q. And were these regular twelve ounce beers or were they tap beers?

A. Twelve ounce beers.

Q. Now, is it your testimony that the car that struck your car was signalling for a right turn?

A. I believe so.

Q. What street was that turning into?

A. I believe it's 23rd.

Q. And why were you turning into 23rd Street?

[10] A. To go into Cumberland.

Q. And were you heading for home?

A. No.

Q. Where were you heading for?

A. We were heading for a bar.

Q. Another bar?

A. Yes.

Q. And who was with you in the car?

A. Carol Linbuhr.

MR. WILLIAMS: I have no further questions.

REDIRECT EXAMINATION BY MS. KINGSLEY:

Q. You were asked about the other times that you had a driving while intoxicated charge. Had you ever been involved in an automobile accident before on one of those occasions?

A. No.

Q. Ever injured anyone before when you've been drinking?

A. No.

Q. Did you intend to injury or hurt anyone on the date this occurred?

A. No.

Q. You were asked about the number of drinks you had at the bar. Did you have drinks before you got to the bar?

A. Yes, I did.

Q. Tell me about how many and what kind?

A. Probably around a twelve pack before I went to the bar.

[11] Q. And as a result when you were arrested for this did you plead guilty to this?

A. Yes, I did.

Q. Other than serving time and probation, was there any other part of your sentence?

A. No.

MS. KINGSLEY: That's all I have. Thank you.

THE COURT: Anything else, Mr. Williams?

MR. WILLIAMS: Just a couple questions.

RECROSS EXAMINATION BY MR. WILLIAMS:

Q. Mr. Hogner, you think you had a twelve pack of beer before you went to Dale's Twin Pines?

A. Yes.

Q. And at Dale's Twin Pines you had four to six, is that right?

A. Yes.

Q. So that would be at least 16 cans of beer and maybe 18 cans of beer, is that right?

A. Yes.

MR. WILLIAMS: I have no further questions.

MS. KINGSLEY: Just one more.

FURTHER REDIRECT EXAMINATION
BY MS. KINGSLEY:

Q. You talked about the number of beers. Can you tell me over what period of time that was? I mean, when during the [12] day you started and then how long until the accident?

A. It was probably within a five hour period.

MS. KINGSLEY: Okay. That's all I have. Thank you.

MR. WILLIAMS: No more cross.

THE COURT: You can step down. Any other witnesses?

MR. WILLIAMS: Call LeRoy Strenke in rebuttal.

LE ROY STRENKE, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WILLIAMS:

Q. Mr. Strenke, were you intending to turn at 23rd Street as your car approached that driven by Mr. Hogner?

A. No, I was not.

Q. Did you have any turn signal on?

A. No, I did not.

Q. Where were you bound for at the time of the collision?

A. I was on my way to my home.

Q. And is your home east or west of 23rd Street?

A. My home is west.

Q. Can you hear me? And is your home east or west of 23rd Street?

A. It would be west.

Q. And what is the path that you customarily follow to [13] your home?

A. Highway 48.

Q. And how many miles at 23rd Street would you deviate to get to your home?

A. Approximately nine miles.

Q. Do you know anybody who lives on 23rd Street?

A. No, I don't.

Q. Did you have any reason to be turning on 23rd Street?

A. No.

MR. WILLIAMS: No further questions.

THE COURT: Ms. Kingsley?

MS. KINGSLEY: No, Your Honor.

THE COURT: All right. You can step down.

MR. WILLIAMS: Rest.

THE COURT: Anything else?

MS. KINGSLEY: Rest.

THE COURT: Okay. Well, we'll figure out the jury instructions for this section so why don't we take them out for a little bit. This shouldn't be too long.

(Whereupon jury leaves courtroom).

THE COURT: The only three instructions I have apparently there is the middle burden of proof on this?

MS. KINGSLEY: Right.

THE COURT: So I'll read the burden of proof. The burden of proof on Question 1 rests upon the [14] party contending that the answer to the question should be yes, and, of course, that question would be, "Did Levi Hogner act maliciously toward LeRoy Strenke or in an

intentional disregard of the rights of LeRoy Strenke?" Yes or no. So the burden of proof is on the plaintiff.

MS. KINGSLEY: Your Honor, I should put in at this point under Wisconsin Law in order for this to go to the jury they have to prove a prima facia case and I'd like to make a motion for a directed verdict for this portion.

THE COURT: Go ahead.

MS. KINGSLEY: Well, under Wisconsin Law they have to show an intentional disregard for the rights of others. As Mr. Williams pointed out in his closing argument to the first portion of the trial, this was a careless mistake. This was a left turn accident. This isn't a case where you've got a drunk weaving down the road hitting cars. It's an accident which can occur at any time at an intersection. He thinks he sees a turn signal. Whether he does or not he thinks he's got time to make it through the intersection and he doesn't make it through. Certainly negligent and we stipulate to that. Certainly careless, but I don't think under Wisconsin case law that it rises to the level of being an intentional disregard for someone else's rights.

The case law, and perhaps Mr. Williams has other cases, [15] the case law that we looked at in this regard indicated that Wisconsin has not yet adopted a rule that says that if a person is drinking alcohol it definitely is a prima facia case, and absent aggravating circumstances or as the cases point out, absent outrageous conduct that then there's not sufficient evidence for it to go to the jury and we would argue in this case there's not sufficient evidence.

THE COURT: Mr. Williams?

MR. WILLIAMS: Judge, I have a number of cases which I can present to you. There's *Lievrow v. Roth* which is a Court of Appeals case, 157 Wis. 2d, 332, and I'm quoting from the head notes here. "Deliberately driving while alcohol impaired may warrant imposition of punitive damages in appropriate case where the outrageous conduct of driving while alcohol impaired has caused or contributed to the plaintiff's damages."

And the other head note, "Evidence of other incidents of drunk driving by a defendant was admissible in a civil action seeking compensatory and punitive damages arising out of an accident which occurred while defendant was allegedly intoxicated in order to show that he was aware of the danger of driving while intoxicated."

In the case, that's Court of Appeals, incidently, Judge, 1990. And the 1985 case, *Brown v. Maxey* in the Supreme Court, it says punitive damages may be awarded if the [16] plaintiff proves by clear, convincing evidence defendant's conduct was willful and wanton in disregard of rights of others.

And then we go to the 1990 case, Court of Appeals, *Twist v. Lale*, and quoting, "Conduct is outrageous if done in reckless disregard of another's rights reflecting a flagrant indifference to public safety". And quoting to the body of it, "Evidence of Lale's reckless driving provided an adequate basis for a finding that Lale recklessly disregarded Twist's rights and was flagrantly indifferent to public safety". And there are other unpublished opinions.

So what I wanted to call your attention to was the presumption under 885 of amount of intoxication. As Circuit Judge is aware, the 10th Judicial District sentencing guidelines puts this level of intoxication into the

highest category both for consumption of alcohol or amount of alcohol by test and the fact that there was an accident which was, in effect, caused by this and the fact then that it is a 5th offense and I'd ask you to take judicial notice of State versus Hogner, 98-CT-134 in which Hogner was convicted of a felony DWI on March 22, 1999, arising out of an incident which occurred on October 16th of 1998, this case.

So I think we've shown enough that this man's conduct was knowing, outrageous. He consumed, it appears, between 16 and 18 beers over a five hour period and the test, which is [17] undisputed, was .269. Certainly what I would consider to be a high test in my experience.

THE COURT: Anything else?

MS. KINGSLEY: No.

THE COURT: All right. I'm reading from 1707.01 which is the jury instruction for punitive damages, non-products liability for actions commenced on or after May 17, 1995, and it says punitive damages may be awarded in addition to compensatory damages if you find that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff, and it says that a person's actions are malicious when they are the result of hatred, ill will, a desire for revenge or inflicted under circumstances where insult or injury is intended. I don't think that portion fits this fact pattern as I understand the evidence.

I think I can say as a matter of law there's no evidence that indicates that Mr. Hogner's acts were a result of hatred, ill will, a desire for revenge or inflicted under circumstances where insult or injury is intended. But I

think the portion that will allow this case to go to the jury is there's a dispute from the second sentence of the second paragraph and that's where it says a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's [18] rights or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded.

I think the argument of the plaintiff is that Mr. Strenke as an operator of a motor vehicle on a public road in Wisconsin at the time and place that's material to this lawsuit is a class of people who are Wisconsin motorists and I think it's arguable that Mr. Hogner, who admitted from the witness chair that within a five hour period he consumed either 16 or 18 twelve ounce containers of beer, and that's one fact. The other fact that's important here is that he was convicted of operating while intoxicated-type offenses over a period of time. He has four convictions prior to this. I think that it can be argued that someone who's had four offense drunk drivings and yet goes out on the day in question and consumes 16 to 18 twelve ounce containers of beer is exhibiting, and I'm assuming that we can, that nobody was holding him down and pouring these down his throat involuntarily, and so I think that's an intentional act which arguably the jury may find that this was a disregard of the rights of the plaintiff and other motorists on the road and, of course, the plaintiff being a class of motorist on the road, and I think that those facts together indicate that Mr. Hogner was aware or should have been aware that his drinking these 16 to 18 twelve ounce containers of beer, [19] coupled with his knowledge of how the law in Wisconsin is on operating while intoxicated since he has four convictions before, that these acts arguably the jury could find that they're practically

certain to result in the plaintiffs rights being disregarded. So I'll deny your motion.

Now, let's go on and I've got the middle burden of proof. Then I have 350, presumptions, conflict as to the existence of basic facts. What is the basic fact that there's a conflict of evidence here? I don't think there's any. It's just what they do with that evidence. So I don't think that even applies.

Now, somebody else want to argue differently?

MS. KINGSLEY: That's fine, Your Honor.

MR. WILLIAMS: No.

THE COURT: Okay. So we won't give that. So the only two instructions that I can see we give them is that we read them the verdict, we read them the burden of proof and we read them the definition of punitive damages and send it all back to the jury.

MS. KINGSLEY: Will we be able to make a brief closing statement?

THE COURT: Sure. We'll do it just like we did before. Mr. Williams goes first and then Ms. Kingsley goes second. Okay?

MR. WILLIAMS: I'd like you to see an [20] instruction under 885, something about levels of intoxication, Judge.

THE COURT: Well, if you present it to me I'll consider it.

MR. WILLIAMS: I'll seek that. With your permission I will craft an instruction that parallels

885.235(cd) which indicates that the presumptive level of intoxication of .08 is presumptive that a person is under the influence of alcohol.

MS. KINGSLEY: And, Your Honor, I would strongly object. I'm guessing, I haven't seen the statute, but I would assume this is used in criminal matters and would not be appropriate in this action. I think the jury instructions cover the issue for civil matters and I think that would be very prejudicial to my client.

THE COURT: Here's what it says. 885.235 is entitled chemical test for intoxication and then it talks about in (1)(cd), it says in cases involving persons who have two or more prior convictions, suspensions or revocations as counted under 343.307, and it's stipulated that Mr. Hogner fits in that category, the fact that the analysis shows that the person has an alcohol concentration of .08 or more is prima facia evidence that he was under the influence of an intoxicant and is prima facia evidence that he or she has an alcohol concentration of .08 or more and that's what you want [21] me to read to them, correct?

MR. WILLIAMS: Yes.

MS. KINGSLEY: Your Honor, I don't think there's been any dispute that Mr. Hogner was intoxicated. He admitted what his blood alcohol content was. I think that again, that statute is written for criminal matters. He's already been convicted, served his jail time, his probation for it. I don't think it would be relevant here and I think it would be very prejudicial to my client.

MR. WILLIAMS: As you're aware, Judge, the standard for conviction such as Mr. Hogner's is .02 in cases for 5th offense and the purpose that I wanted to do that is

to be able to tell the jury with a foundation behind it that Mr. Hogner was three times in excess of the legal limit for DWI.

MS. KINGSLEY: Your Honor, if it would expedite things we would be happy to stipulate Mr. Hogner was legally intoxicated at the time.

THE COURT: Well, I'm going to allow it. I don't know exactly how it's going to be worded because I'm certainly not going to use terms like prima facia and things like that. I think what I'll do is just instruct them the parties have stipulated that at the time of the accident Mr. Hogner was legally intoxicated. The parties have also stipulated that before the accident, before the time of the [22] accident Mr. Hogner had been convicted of four prior operating while intoxicated offenses, therefore setting the standard, setting the blood alcohol standard for intoxication at .08 or more.

The parties have stipulated at the time of the accident Mr. Hogner was legally intoxicated. The parties have also stipulated that before the time of the accident Mr. Hogner had been convicted of four prior OWI offenses. Therefore the blood alcohol standard for intoxication is .08 or more. Okay. That's what I'm going to put in but you can make your objections on the record.

MS. KINGSLEY: Yah, I do want to make my objections on the record. Mr. Hogner was willing to stipulate that he was intoxicated at the time and I think that by bringing this element in it's confusing for the jury and they're going to be looking at this and the question to them. I think this confuses this with the criminal standards and he's already pleaded guilty and been convicted. He pleaded guilty and he served his time for that. I think

this is going to confuse them and I think we have all that we need in the punitive damage instruction. So I'd like to make my objection for the record.

THE COURT: Okay. Your objection is noted for the record and it's an argument that I understand and the only reason I think that it's fair game for Mr. Williams to [23] get this in based upon my previous ruling that I think the punitive damage instruction is appropriate in this case based upon his level of intoxication, amount of beer that he had in this five hour period and the fact that he knew or should have known since he was convicted of four offenses before that this is, I think, showing flagrant indifference to public safety, as Mr. Williams quoted from this one case, and because of that I think that provides a threshhold for Mr. Williams to, if he cares to, to argue that in this particular case Mr. Hogner was over three times the level of intoxication legally. Well, now, this is a misnomer. Sometimes we call it legal intoxication which in his case it's .08. So three times .08 would be .24. So I think that that's a fair argument that Mr. Williams has told us he wants to make to the jury and if he wants to do that I think he has a right for the Court to instruct the jury that he's correct. In this case .08 is the standard for the bar that Mr. Hogner, being convicted of two or more priors, should not have crossed and so I think it's okay. So that's what I'm going to do. But I understand your objection and perhaps the three wise guys down in Wausau will agree.

Okay. Can we bring them in?

(Whereupon jury returns to courtroom).

THE COURT: I am now going to instruct you on the law that's applicable to this phase of the trial [24] concerning punitive damages. First of all I want to tell you

that punitive damages have a different burden of proof than what you considered for these compensatory damages on the last verdict and this verdict that you're going to see just has two questions on it and it says, special verdict form as to punitive damages. It says, "We, the jury, hereby answer the special verdict question as follows: Question 1: Did Levi Hogner act maliciously toward LeRoy Strenke or in an intentional disregard of the rights of LeRoy Strenke?" And you're to answer that one either yes or no.

Then it says, "If you answered the preceding question 'yes', answer the following question:" In other words, if you answer Question 1 "no", you're done. If you answer it yes, then go on to Question 2. "What sum, if any, do you assess against Levi Hogner as punitive damages?" And then you've got your answer with a dollar sign in the blank line like you had for compensatory and that's it and it's to be dated today's date because I assume you won't come in after midnight. But if you do, put in the correct date and then the presiding juror or dissenting jurors.

Now, as to Question Number 1, this is where the burden of proof changes from the last verdict, which only was ordinary, so I'll read you this and I'll give this to you to take in. The burden of proof on Question 1 rests upon the party contending that the answer to the question should be [25] "yes", and, of course, that's the plaintiff. This burden is to convince you by evidence that is clear, satisfactory and convincing to a reasonable certainty that "yes" should be the answer to that question.

Clear, satisfactory and convincing evidence is evidence which, when weighed against evidence opposed to it, clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer

because of its greater weight and clear, convincing power. This burden of proof is known as the "middle burden".

The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence, which is what you had in the last verdict, but less than the higher burden which is beyond a reasonable doubt and that's the burden that's used in a criminal case.

If you have to guess what the answer should be after discussing all evidence which relates to a particular question, or if you conclude that the evidence is less than clear, satisfactory and convincing, then the party having the burden of proof as to that question has not met the required burden.

Now, this is the substantive instruction on punitive damages. It tells you what punitive damages are. Punitive damages may be awarded in addition to the compensatory damages that you've already found if you find that the [26] defendant acted maliciously toward the plaintiff, or in an intentional disregard of the rights of the plaintiff. A person's acts are malicious when they are the result of hatred, ill will, a desire for revenge or inflicted under circumstances where insult or injury is intended. A person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded.

The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future.

Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained. A plaintiff is not entitled to punitive damages as matter of right.

Even if you find that the defendant acted maliciously or in an intentional disregard of the plaintiff's rights, you do not have to award punitive damages. Such damages may be awarded or withheld at your discretion.

You may not, however, award punitive damages unless you have awarded compensatory damages, which you already have.

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct.

[27] Factors you should consider in answering this question include one, the grievousness of the defendant's acts. Two, the degree of malicious involvement. Three, the potential damage which might have been done by such acts as well as the actual damage, and four, the defendant's ability to pay.

You may consider the defendant's wealth in determining what sum of punitive damages will be enough to punish the defendant and deter the defendant and others from the same conduct in the future.

Okay. That's it. So we'll start with the arguments on this issue. Mr. Williams?

MR. WILLIAMS: Thank you, Your Honor. This is the portion where I told you about we were going to do this in two phases. The Judge has explained this now. The question that you have to determine if a person who has

been convicted of drunk driving four times and now jumps into the felony level, a 5th offense drunk driving, is that –

THE COURT: Wait a minute. I forgot to give them one other instruction.

MR. WILLIAMS: That's on that percentage.

THE COURT: I forgot. Okay. This is my last instruction. The parties have stipulated that at the time of the accident Mr. Hogner was legally intoxicated. The parties have also stipulated that before the time of the accident Mr. Hogner had been convicted of four prior OWI [28] offenses. Therefore, the blood alcohol standard for intoxication is .08 or more. Okay. I'm sorry, Mr. Williams.

MR. WILLIAMS: You can see what happens towards the end of these trials where lawyers get tired and start letting slip on this stuff here.

But anyhow, here you've got the case. It's a philosophical question. Do you wish to condemn Levi Hogner's conduct in driving, having had four convictions where he goes and gets fired up and goes to three times the lawful limit of alcohol because we stipulated that the level of alcohol intoxication was .269.

Judge Henderson's last instruction to you indicates that the level, the line when you're over the line or not over the line is .08 in this.

Now, I do a lot of defense work and I can tell you my belief is that once you reach that 5th level when it changes from being a misdemeanor, stops being a misdemeanor, that people can make, and many people do make a mistake of multiple OWI's for one, two, three, four at which the law treats them fairly benignly with County Jail time

and such appropriate punishment where they are not branded with the defense of a felony conviction. Once you get to the 5th offense, you get to a felony and I suggest to you that I've got to condemn this or tell you because isn't it outrageous? Isn't it in reckless disregard when somebody gets in a car, [29] having been convicted four times, having consumed 16 to 18 beers in a five hour period and is driving down the road with other people on the road with the intent to go to another bar and get more?

Now, is that worthy of condemnation or not? Is it worthy of punitive, meaning punishment, damages to show that society says, this doesn't cut it? And I think that that's what the question you folks have to tell us. If you say no, then your duty is done. If your answer is yes, that that conduct steps beyond that of being a mistake and gets into the point of being outrageous to the point of deserving some punishment with it itself, then you have to answer the other questions and I've suggested the other answer to the question should be a sum of money sufficient to get the notice of Mr. Hogner and the notice of the public and the notice of the people that five offenses and causing somebody injury is too much. And it's not only when you cause an injury of the magnitude which you've assessed to Mr. Strenke, but it requires some kind of a message coming from the voice of the State, that is you folks as members of the public, saying we condemn this conduct and that conduct alone in itself is worth punitive damages and I suggest to you the figure of $25,000 is a reasonable sum under these circumstances to say, enough is enough. $25,000 worth of punishment. That may encourage Mr. Hogner, may encourage other people to not drive [30] again when you have consumed 16 to 18 beers or even a

lesser amount that would put you at .08 blood alcohol, three times the level in this case. That's the argument.

THE COURT: Ms. Kingsley?

MS. KINGSLEY: I'm going to equally be brief. Just to clarify, and the Judge already explained to you, it is a different standard of proof. It's clear and convincing evidence. Please keep that in mind when you come to your decision.

There's no question here that what Mr. Hogner did wasn't right. He's a very nice man. He did a very stupid thing. There's no question here. Mr. Hogner has been very up front through the entire trial about what happened.

But what you have to decide is did what he did rise to the level of intentional disregard of Mr. Strenke's rights? So I do ask you to keep the distinction.

It's one thing to say, geez, that was really stupid and that's true, but that's not the question before you. That would be an easy one to answer.

The question is, did he go out there and intentionally disregard somebody's rights? He testified he didn't intend to do it.

Yes, he had prior convictions. He was up front about those. But did he intend it? He had never hurt anybody before. He knew he had never been in an accident while [31] driving before.

Should he have made the jump and known when he went out he was going to injury somebody? Well, that's kind of a large leap. He's not making any excuses.

The other thing, when you talk about intentionally disregarding somebody's rights, I think there's two parts here. Should he drink and drive which, no, you shouldn't, but does that make your actions intentional if somebody gets hurt?

The other thing I wanted to bring up is in this case this isn't one of those cases where the drunk drives into the side of a house or somebody's weaving down the road and hitting people. This is a left turn at an intersection. It's the type of case, the type of accident that happens every single day whether or not somebody was intoxicated. So think about that when you're determining was this outrageous conduct.

Also you've heard that at least Mr. Hogner thought Mr. Strenke was going to turn. Whether or not that turn signal was on, Mr. Hogner believes it was and he thought that he could make the turn ahead of time. He certainly didn't intend to injure anybody.

I want to point you to a couple other things in the instructions. The reason I asked Mr. Hogner so much about what do you make and what are your expenses and everything is [32] because you do have the right to look at the defendant's ability to pay when you're looking at that part of the trial and I think it was pretty clear from Mr. Hogner's testimony. There's extremely limited ability to pay. He makes about $2,000 a month. He is covering his expenses but he is paying child support and those types of things. Really not much left over if you do the math on the numbers he gave you and that's why we brought it up.

The other thing that you're asked to look at and the Judge did read to you, the degree of malice involved. Well,

there's been no testimony that there was any malice here between the parties.

And the other thing he explained is this type of damage. You can award these damages if your purpose is to deter someone or punish someone. Mr. Hogner has already been punished for this. He's served time. He told you his sentence was a year. He talked about that. He pled guilty. He didn't try, you know, he didn't try to say, I didn't do it. He pled guilty. He served his time and I want to point out that this was in 1998 and so if one of the purposes is to deter conduct, you want to think, okay, what's it going to take to make this person not do this again? It's already happened. You heard the years of those convictions and when he pled guilty. That hasn't happened since. This accident did stop it cold back in 1998. He's taken responsibility. [33] He hasn't had this happen again. He has turned things around and he's come into court and said, I did it. It was stupid but I did it. That's basically the effect of what he's saying.

And the last thing I want to say is in Mr. Williams closing argument on the first part of his case he said, I think three times that I heard, it was a moment of carelessness and that's what this was. It was a stupid mistake. It was a moment of carelessness. That doesn't mean that it was a moment of intentionally going out and disregarding somebody else's rights.

Because he served his time, because he owned up to this, we believe he has been punished. He certainly shows that he has been deterred and we don't feel that in addition to what he's already gone through that an award of punitive damages would be justified. Thank you.

MR. WILLIAMS: Just a couple comments. Ms. Kingsley says he went and pled guilty. He didn't. He pled no contest, saying he didn't admit doing wrong. And under the argument Ms. Kingsley made they're saying that it has to be intentionally directed to LeRoy Strenke. He didn't know LeRoy Strenke. But under Ms. Kingsley's argument if you remember that famous case down in Kentucky where a fellow got drunk and went down the wrong way on the interstate and killed a bunch of kids in a school bus?, Well, he didn't [34] intend to do that and therefore no punitive damages.

The intentional act is getting in the car and driving a car in reckless disregard of the rights of the public. When I go home tonight to Amery, when you folks go home or when anybody goes home they have a right to expect that the cars that are opposing them that are on the highway are not driven by a person who's under the influence and in this case he's been punished. He was punished on the first offense. He was punished on second offense. He was punished on third offense. He was punished on fourth offense. She's saying he shouldn't be punished here. If that's the case, the more cases he gets of drunk driving and that, the more likely it is he shouldn't be punished because he's been punished five times, six times, seven times before. You know, that doesn't scour to the substance.

My suggestion to you is that this is an appropriate case for the award of punitive damages and you folks have the discretion to condemn this and say, this is wrong and we will punish. Tell the world that this is wrong by giving an award of punitive damages. That's all I have. Thank you.

THE COURT: Well, here's the verdict and the jury instructions.

(Whereupon jury leaves courtroom at 2:01 P.M.)

(Whereupon jury returns to courtroom at 2:33 P.M.)

THE COURT: The jury hereby answers the [35] special verdict questions as follows: "Question 1. Did Levi Hogner act maliciously towards LeRoy Strenke or in an intentional disregard for the rights of LeRoy Strenke? Answer 'Yes'."

"Question 2, what sum, if any, do you assess against Levi Hogner for punitive damages? Answer $225,000." There are no dissents. It's signed by the foreperson.

Is that your verdict?

JURY: Yes.

THE COURT: Ms. Kingsley, do you want to poll the jury?

MS. KINGSLEY: That's okay, Your Honor.

THE COURT: Okay. My final instruction to you is you do not have to answer questions about this case by anyone other than by me, and your service in this case is completed, and this includes the parties, lawyers, the media or anyone else. It is in the public interest that there be the utmost freedom of debate in the jury room and that jurors be permitted to express their views without fear of incurring the anger of any litigants or criticisms of any persons.

While nothing prohibits you from disclosing what happened in the jury room, you do not have to discuss the

case with anyone or answer any questions about it. You may confer with me before answering any questions asked by anyone.

[36] So there we have it.

(Whereupon jury leaves courtroom).

THE COURT: Anything else you want to do today?

MR. WILLIAMS: Nothing today, Judge, for the plaintiff.

THE COURT: Okay. Thank you.

(END OF RECORD)

[37] State of Wisconsin)

County of Barron)

I, Kevin Babbitt, hereby certify that I have compared the foregoing transcript with the shorthand notes taken by me at the hearing held in the above-entitled matter and find the same to be a true and complete transcript of said notes and containing all the proceedings had on said hearing.

/s/ Kevin Babbitt
Circuit Court Reporter